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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-549

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,

Petitioners,

v.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION TO ADVANCE AND FOR PENDENTE LITE RELIEF

GEORGE B. LITTLE
JAMES K. CLUVERIUS
Browder, Russell, Little & Morris
1510 Ross Building
Richmond, Virginia 23219

CONARD B. MATTOX, JR.
City Attorney
1001 East Broad Street
Richmond, Virginia 23219

Attorneys for Petitioners

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No. 72-.....

THE SCHOOL BOARD OF THE CITY OF RICHMOND, VIRGINIA, ET AL.,

Petitioners,

v.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, ET AL.

MOTION TO ADVANCE AND FOR PENDENTE LITE RELIEF

Petitioners, the School Board of the City of Richmond, Virginia, and the individual members thereof, respectfully move that the Court advance its consideration and disposition of this case. As is stated in the annexed Petition for Writ of Certiorari, issues of national importance are presented which require resolution by this Court sufficiently in advance of the September, 1973 school term to guide the many similarly involved courts and school authorities in planning for the coming school year.

Wherefore, Petitioners pray that the Court:

1. Advance consideration of the Petition for Writ of Certiorari and any response thereto during the current term; and

2. If the Court determines to grant the Petition for Certiorari, arrange such procedures as will permit prompt

decision of the merits as the Court may deem appropriate. If the Court decides to hear argument, it is suggested that the case be considered on the original record. Even though the record is voluminous,[1] the determinative facts in the matter are largely uncontradicted which factor disposes of the need for the time consuming preparation and printing of any lengthy appendix. See *Alexander* v. *Holmes County Board of Education*, 396 U.S. 802 (1969) (accelerated hearing on original record).

Petitioners also seek *pendente lite* relief pending disposition of the Petition for Certiorari comparable to that granted by the Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 399 U.S. 926 (1970) and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 226 (1969), and companion cases, namely, an order providing in substance that:

(1) The respondents shall take such preliminary steps as may be necessary to prepare for the complete implementation of the District Court's order of January 10, 1972, to the end that said order may be implemented by the September, 1973 school year in the event this Court should uphold the District Court on the merits; and

(2) The respondents shall take no steps which are inconsistent with or will tend to prejudice or delay full implementation of the January 10, 1972 order at the commencement of the 1973-74 school term.

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[1] The separate appendix accompanying the attached Petition for Writ of Certiorari which includes only the opinions below and the relevant state constitutional and statutory provisions is composed of two volumes containing over six hundred pages. The hearings below encompassed over four weeks of trial, involved eight separate groups of parties, included the introduction of more than 325 exhibits, and resulted in a transcript of approximately 3,500 pages.

Such an order is necessary to avoid the possibility that the delay while the case is being reviewed will unnecessarily prejudice the substantive rights of all pupils in the Richmond public schools to be relieved of attending racially identifiable schools. *See Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969).

Respectfully submitted,

GEORGE B. LITTLE
JAMES K. CLUVERIUS
Browder, Russell, Little & Morris
1510 Ross Building
Richmond, Virginia 23219

CONARD B. MATTOX, JR.
City Attorney
1001 East Broad Street
Richmond, Virginia 23219

Attorneys for Petitioners

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TITION FOR A WRIT OF CERTIORARI TO THE UNITED ATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, the School Board of the City of Richmond, ginia, and the individual members thereof, (hereinafter erred to as the Richmond School Board), pray that a t of certiorari issue to review the decision of the United tes Court of Appeals for the Fourth Circuit, entered in above entitled case on June 5, 1972.

OPINIONS BELOW

The opinions of the courts below directly preceding this tion[1] are as follows:

[1] Earlier proceedings in this case are reported as *Bradley* v. *School of City of Richmond*, 317 F.2d 429 (4th Cir. 1963); 345 F.2d 310 Cir.), *rev'd and remanded*, 382 U.S. 103 (1965).

1. Opinion and order dated August 17, 1970, reported at 317 F. Supp. 555 (directing implementation of interim plan of desegregation in Richmond system for September, 1970) (Appendix hereto 1a).[2]
2. Opinion and order dated December 5, 1970, reported at 51 F.R.D. 139 (directing joinder of various State and County defendants) (48a).
3. Opinion dated January 8, 1971, reported at 324 F. Supp. 439 (denying recusal motions submitted by County defendants) (58a).
4. Order filed January 13, 1971, *nunc pro tunc*, January 8, 1971, unreported (disposing of various pre-trial motions, etc.) (91a).
5. Opinion and order dated January 13, 1971, unreported (disposing of various pre-trial motions) (94a).
6. Opinion and order dated February 10, 1971, opinion reported at 324 F. Supp. 396 (denying three-judge court) (98a).
7. Opinion and order dated February 10, 1971, opinion reported at 324 F. Supp. 401 (denying motion to drop additional parties in individual capacities) (107a).
8. Opinion and order dated April 5, 1971, reported at 325 F. Supp. 828 (directing implementation of desegregation Plan III in Richmond system for 1971-72 school year) (110a).

[2] The appendix of opinions below is printed in separate volumes because of its length.

9. Opinion and order dated July 20, 1971, unreported (denying motion to convene three-judge court) (156a).

10. Order dated September 15, 1971, unreported (denying motion to limit evidence) (163a).

11. Memorandum opinion and order dated January 5 and 10, 1972, respectively, reported at 338 F. Supp. 67 (directing implementation of metropolitan area desegregation plan in Richmond, Henrico and Chesterfield for 1972-73 school year) (164a).

12. Opinion and order dated January 19, 1972, unreported (denying stay of January 10, 1972 Order) (546a).

13. Order of Court of Appeals granting partial stay dated February 8, 1972, reported at 456 F.2d 6 (553a).

14. The opinions of the Court of Appeals reversing the District Court filed June 5, 1972, reported at 462 F.2d 1058, are as follows:

    a. Opinion for the Court by Judge Craven (562a).

    b. Opinion of Judge Winter dissenting (585a).

15. The amended judgment of the Court of Appeals appears at 603a.

JURISDICTION

The opinion of the Court of Appeals was entered June 5, 72, and its amended judgment was filed on August 14, 72. By an order dated August 12, 1972, Mr. Justice uglas granted the Richmond School Board an extension time to file a Petition for Writ of Certiorari from Sep-

tember 5, 1972, to and including October 5, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. The extent to which the effectiveness of relief in *de jure* metropolitan communities may be dependent upon the manner in which a state may choose to align its local school divisions.

2. Under what circumstances the remedial powers of a district court may be limited by existing school division boundaries.

3. Whether, in the formulation of effective relief, district courts are permitted to utilize means coextensive with those used by school authorities in the past to establish and perpetuate a statewide system of dual schools.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following relevant Virginia school laws in force prior to July 1, 1971, are set out in the separate Appendix

ereto (604a-613a): Constitutional provisions: Sections 29, 130, 132, and 133; Statutes: Sections 22-1, -2, -7, -30, 34, and -100.1 through -100.12.

The following relevant Virginia school laws which became ffective July 1, 1971, pursuant to the revision of the Constitution of the Commonwealth of Virginia are set out in he separate Appendix hereto (614a-623a): Constitutional rovisions: Article Eight, Sections 1-7; Statutes: Sections 22-1.1, -30, -32, -100.1, -100.3 through -100.11, 126.1, -127, and -21.2.

STATEMENT

1. Introduction

The Richmond School Board is here seeking review of n *en banc* decision of the United States Court of Appeals or the Fourth Circuit reversing in all respects the judgment and order of District Judge Robert R. Merhige, Jr., f the Eastern District of Virginia, which had directed the mplementation of a desegregation plan encompassing three ichmond metropolitan area school divisions. The District ourt had ordered the consolidation of the Henrico and hesterfield County school divisions with the school divion of the City of Richmond, substantially in accordance ith existing provisions of state law, as "a first, reasonable nd feasible step toward the eradication of the effects of e past unlawful discrimination" practiced by the State nd local school authorities involved. (239a) In the majority opinion written by Judge Craven, five members of e Court of Appeals concluded that the District Judge nd exceeded his authority in that, regardless of the relative ffectiveness of alternative desegregation plans presented, e remedial power of a district court could not extend beond existing school division lines absent a showing of

discriminatory purpose or motivation in the establishment or maintenance of such lines or of joint interaction by any two of the three school divisions involved for the purpose of keeping one system relatively white by confining blacks to another.[3] (562a, 572a) Judge Winter, however, viewed the lower Court's decree as embodying the only relief permissible under the Fourteenth Amendment and would have affirmed. (586a)

2. Proceedings Below

This case is an outgrowth of the Richmond school desegregation suit originally filed by black parents and students in 1961, pursuant to 28 U.S.C. § 1343, 42 U.S.C. § 1983, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.[4] The current phase of

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[3] In reaching this conclusion, the Court of Appeals failed to find as clearly erroneous any of what the District Court had viewed as operative facts established by largely uncontradicted evidence, but in some instances substituted its conclusions as to the inferences to be drawn therefrom. This action on the part of the Appellate Court is discussed more fully *infra*, at pp. 44-48.

[4] The case was first tried during 1962 at which time the plaintiffs sought transfers of pupils from Negro public schools to white public schools and, on behalf of all persons similarly situated, an injunction restraining the Richmond School Board from operating racially segregated schools. The District Court approved the individual transfers but refused to grant further injunctive relief and the plaintiffs appealed. The Court of Appeals reversed the order in part, holding that plaintiffs' class were entitled to an injunction restraining the Richmond School Board from maintaining a discriminatory "feeder" system which in effect had perpetuated segregated schools. (317 F.2d 429 [1963]). Again, in 1965, the Court of Appeals upheld a District Court order approving what was in effect a limited freedom of choice plan. (345 F.2d 310 [1965]). This Court, however, vacated the order of the Court of Appeals and remanded the case for consideration of allegations relating to discriminatory faculty allocations, specifically noting that more than a decade had passed since its decision in *Brown v. Board of Education (II)*, 349 U.S. 294 (1955), and that delays in desegregation of school systems could no longer be tolerated. (382

the litigation began in March of 1970 when the plaintiffs, relying upon decisions which this Court had rendered nearly two years previously,[5] again sought the desegregation of the Richmond public school system.

Pursuant to the plaintiffs' motion, a series of hearings was conducted during June and August of 1970 by District Judge Robert R. Merhige, Jr., who entered his initial judgment (317 F. Supp. 555; 1a) finding that the Richmond system was still illegally segregated under freedom of choice in that the various facilities were as to student population and staffs readily identifiable as either black or white schools.[6] (7a-8a) Even though the plan submitted by the Richmond School Board at this time was found not to create a unitary system of schools, Judge Merhige nevertheless accepted it as an interim measure for the 1970-71 school year while at the same time requiring the School Board to come forward with another plan at a later date.[7] (38a-41a)

With the implementation of the "Interim Plan" in September, 1970, however, the City school system experienced a 300 per cent increase in the normal rate of attrition of its white students. Stating that complete and effective relief could not be provided within the City alone, the Rich-

U.S. 103, 105 [1965]). During the school years 1966-67 through 1969-70, the schools in the City of Richmond were operated under a freedom-of-choice plan pursuant to a consent decree entered by the District Court in March of 1966.

[5] *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Bd. of Comm'rs.*, 391 U.S. 450 (1968); *Raney* v. *Bd. of Educ.*, 391 U.S. 443 (1968).

[6] In his opinion, Judge Merhige made extensive findings regarding the existence and effects of *de jure* segregation within the City of Richmond alone. (8a-13a)

[7] The Richmond public schools were operated under the "Interim Plan" for the duration of the 1970-71 school year in that the District Court on January 29, 1971, declined to order any further relief in the middle of the school year. 324 F.Supp. 456.

mond School Board on November 4, 1970, filed a motion under Fed. R. Civ. P. 19 to compel the joinder of parties needed for a just adjudication with a view of presenting a plan of desegregation which would encompass the major portion of the Richmond metropolitan area. Hearings were conducted regarding this new aspect of the case following which the District Court on December 5, 1970, granted the Richmond School Board's motion and directed the plaintiffs to file an amended complaint (51 F.R.D. 139; 48a) which was accomplished on December 14, 1970.[8] Numerous motions, hearings and District Court orders intervened prior to the trial of the matter which did not commence until mid-August of 1971.[9]

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[8] The specific defendants eventually joined under the District Court's order and the plaintiffs' amended complaint were as follows: The Virginia State Board of Education and the individual members thereof; the State Superintendent of Public Instruction; the School Boards of the Counties of Chesterfield and Henrico and the individual members thereof; the Division Superintendents of Schools of Chesterfield and Henrico Counties; and the Boards of Supervisors of the Counties of Chesterfield and Henrico and the individual members thereof. These parties collectively will be referred to as the "State and County defendants."

In their amended complaint, the plaintiffs realleged certain portions of their complaint as originally filed in 1961, including the basis for federal jurisdiction in the matter as previously noted *supra*, at p. 6.

[9] On January 4, 1971, the County defendants filed a motion for recusal and joined with the State defendants in moving for a dismissal of the amended complaint. At the January 8, 1971 hearings on these motions, at which time Judge Merhige delivered his opinion denying the recusal motion (324 F. Supp. 439; 58a), the State and County defendants submitted a number of additional motions. On January 13, 1971, the District Court issued orders disposing of many of these pre-trial motions and directing the State and County defendants to answer the amended complaint. (91a; 94a) All defendants submitted answers to the amended complaint on January 15, 1971, and the Richmond School Board in conjunction with its answer filed a cross-claim reasserting allegations made in its motion for joinder and specifically requesting relief in the form of consolidation of the Richmond, Chesterfield and Henrico school divisions. On February 10,

Even though the metropolitan phase of the case had been substantially advanced, the Richmond School Board still was under an outstanding order of the District Court to come forward with a plan for additional desegregation of the City schools for the 1971-72 school year.[10] On April 5, 1971, Judge Merhige ordered the Richmond Board to implement its "Plan III" for the 1971-72 school year within the City. (325 F. Supp. 828; 110a) Since the metropolitan phase of the case was then pending, the District Court was careful to note that its decision was "based upon the assumption that the city will [in 1971-72] operate as it has heretofore, as a single administrative unit for school purposes." (110a) Judge Merhige further noted that his conclusions were made entirely without consideration of the issues involving the State and County defendants previously joined in the metropolitan phase of the case. (110a, n. 1) Finally, Judge Merhige cautioned that his approval of the Richmond plan was conditioned upon its ultimate effectiveness as "[t]he Constitution is satisfied only when an integration plan 'works' in practice and not merely on paper." (148a-149a)

Concurrently with the trial of the issues involving the metropolitan relief, the Richmond School Board was opening its schools under "Plan III." Once again in September, 1971, figures indicated a substantial acceleration in white

1971, the District Court entered its memorandum opinions and orders denying State and County motions for a three-judge court and for the dropping of parties in their individual capacities. (324 F.Supp. 396, 401; 98a; 107a) Other pre-trial motions submitted by the State and County defendants were subsequently disposed of by Judge Merhige on July 20 and September 15, 1971. (156a; 163a)

[10] Pursuant to a report submitted to the District Court in November of 1970, the Richmond School Board on January 15, 1971, filed alternative plans for the additional desegregation of the City schools for the coming school year. Hearings on the proposals were conducted in the District Court on March 4, 1971.

attrition within the Richmond system in that of the approximately 17,500 white students anticipated to enroll, only 13,500 actually were in attendance.

On January 10, 1972, Judge Merhige issued his opinion (338 F. Supp. 67; 164a) and filed his order (536a) directing the September, 1972 implementation of the Richmond School Board's metropolitan desegregation plan which embodied the consolidation of the school divisions of Richmond, Henrico and Chesterfield substantially in accordance with provisions of State law.[11] The District Court based its order on extensive findings of discriminatory practices including the following illustrative determinations that:

(1) state and local officials had "by their actions directly contributed to the continuing existence of the dual school system which now exists in the metropolitan area of Richmond." (379a);

(2) "desegregation of the schools of the city and the counties as well cannot now be achieved within the current school division bounds" owing in substantial part to the deliberate deferral by the state and local authorities of plaintiffs' constitutional rights. (207a);

(3) the minimum size school district required "to eliminate the effect of state-imposed segregation, would be that of the division created by the merger of the systems of Richmond, Henrico and Chesterfield." (434a);

(4) "[t]he school division lines here . . . have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." (193a);

[11] These provisions are discussed *infra*, at pp. 33-34.

(5) "[t]he State Board has been deeply implicated in the administration of . . . programs, which were operated completely independently of the wishes of local school officials and resulted in mass movement of pupils across political boundaries in the Richmond area . . . to the extent that it was necessary to appeal to local school boards to confer in order to coordinate the exchange of pupils." (194a);

(6) "[t]he existing [political subdivision lines] have no relation to natural obstacles or substantial governmental interests, but they are related to strict housing segregation patterns, maintained by public and private enforcement and owing their genesis in substantial part to the manner in which the three school divisions have been operated and expanded. Thus by the maintenance of existing school division lines the State advantages itself of private enforcement of discrimination and prolongs the effects of discriminatory acts of its own agents." (195a-196a);

(7) "[t]he proof here overwhelmingly establishes that the school division lines between Richmond and the counties here coincide with no natural obstacles to speak of and do in fact work to confine blacks on a consistent, wholesale basis within the city, where they reside in segregated neighborhoods." (196a); and

(8) regarding the school construction policies of the three school divisions, "[t]he longer term impact of [these policies] has been the exaggeration of the racial disproportion between the city and the two neighboring counties. This has come about by virtue of the maintenance of school division lines as obstacles to pupil assignment for purposes of desegregation while the area's housing patterns, when its population grew, became increas-

> ingly segregated. The continued operation of the schools of each subdivision as racially identifiable facilities moreover necessarily caused each new school and old ones as well to take on the label of a black or white school." This process led to the racial identifiability of the entire systems in issue, with the Richmond system being identifiable as a black one, and that of each county perceivably a white system. (200a-201a)

Applications for a stay of the District Court's order were sought in that Court and denied by Judge Merhige on January 19, 1972. (546a) The Court of Appeals, however, by order dated February 8, 1972, granted a partial stay of Judge Merhige's order pending its disposition of the case on appeal. (456 F.2d 6; 553a)

Following arguments before the Court of Appeals on April 13, 1972, that Court by a five to one vote, on June 5, 1972, filed its opinion reversing the District Court's order. (462 F.2d 1058; 557a)

3. Characteristics Of The Richmond, Henrico And Chesterfield Metropolitan Area

A.

Geography, Demographic Patterns And General Interdependence

The City of Richmond, along with the Counties of Henrico and Chesterfield form the major part of the Richmond Standard Metropolitan Statistical Area.[12] The City of Rich-

[12] As of 1963, the Census Bureau included Hanover County as a part of the Richmond SMSA, which is thus currently composed of the four political subdivisions. At no point is Hanover County contiguous with the City of Richmond, and the substantial part of the County is largely rural in nature. Approximately 9,600 students, 78 per cent of whom are white, attend schools in the Hanover system which number is relatively small in comparison to the enrollments in the other three

mond (63 square miles) occupies the approximate geograpical center of the region, while the Counties of Henrico (244 square miles) and Chesterfield (445 square miles) completely surround and are contiguous with the City at all points north and south of the James River respectively. There are no distinct geographical features or man-made barriers[13] which separate the City from either Henrico or Chesterfield. (401a-402a, 195a)

The Richmond, Henrico and Chesterfield metropolitan area covers a total of 752 square miles, and according to the 1970 Census contains a total of 480,840 persons.[14] Richmond's population totaled 249,621 while the totals for Henrico and Chestefield were 154,364 and 76,855, respectively. (401a-402a) The great majority of Henrico and Chesterfield citizens live in the urban-suburban portions of the respective Counties most closely contiguous with the City of Richmond.

The District Court found that there is a substanial community of interest and general interdependence between citizens in Richmond, Henrico and Chesterfield as demonstrated by such indices as area-wide employment, retail sales, commuter traffic patterns and inter-jurisdictional utility services. Recreational, educational, cultural, transportation and hospital facilities used by the metropolitan

political subdivisions in the Richmond SMSA. In 1967, consultants commissioned by Henrico and Chesterfield to study the Richmond area noted the substantially lesser degree of interdependency between Hanover and the other three components of the Richmond SMSA.

[13] *E.g., Davis* v. *Board of School Comm'rs. of Mobile County*, 402 U.S. 33 (1971).

[14] Concerning the size of the consolidated school division as well as the approximately 104,000 pupils it would contain, Judge Winter noted that Virginia had six school divisions each encompassing more than 700 square miles, as well as another school division, Fairfax County, which enrolled over 135,000 students, or at least 30,000 more than would be enrolled in the proposed Richmond, Henrico and Chesterfield school division. (600a, n. 16)

population are concentrated largely within the City of Richmond. The City is the central economic element in the region as it is the major place of employment, the center of commerce, as well as the situs of the majority of area manufacturing activity and retail sales. (402a-416a)

In 1959 and again in 1967, separate independent consultants studied the Richmond metropolitan area and submitted reports noting the marked interdependence and community of interest between the three jurisdictions. Each report contained general conclusions to the effect that the solutions to many of the local problems could best be accomplished on an area-wide basis through the elimination of the jurisdictional limitation imposed by the existence of the three political subdivisions within the single metropolitan area. (402a-405a)

The percentage of the total black population in the Richmond metropolitan area remained stable over the 30-year period from 1940 (28 per cent) to 1970 (26 per cent). In 1970, however, approximately 84 per cent of the metropolitan black population was confined within the City of Richmond. From 1940 through 1960, the total number of blacks residing in Henrico decreased, and a similar phenomenon occurred in Chesterfield during the period from 1960 to 1970.

B.

PATTERNS OF RACIAL COMPOSITION OF METROPOLITAN AREA SCHOOLS, 1954-1971

(1)

Richmond Schools

During the 1954-55 school year, Richmond enrolled 35,857 students with a racial composition of 20,259 white (56.5 per cent) and 15,598 black (43.5 per cent) students. (417a) From 1954-55 through 1966, the school facilities

within the City of Richmond remained all-white or all-black in a manner identical to enrollment patterns prior to 1954.

In September of 1969, the racial composition of the Richmond School system was 70.5 per cent black and 29.5 per cent white. (416a)

In the thirteen month period from September, 1970, to the end of September, 1971, during which City school officials implemented two desegregation plans, approximately a third of the white student enrollment which originally had been expected to attend Richmond schools in the beginning of the 1970-71 term had left the system. (417a)

As the result of an annexation of a portion of Chesterfield by the City of Richmond which, for school purposes, did not become effective until the end of the 1969-70 school year, the City system anticipated a significant influx of white students for the 1970-71 term.[15] In planning for the opening of its schools in September of 1970 under the newly approved "Interim" desegregation plan, the Richmond School Board thus anticipated a racial mix of 60 per cent black and 40 per cent white, but of the 20,400 whites expected, only 17,203 actually enrolled. (167a, 417a) During the 1970-71 school year under its first plan of substantial desegregation, the Richmond system was 64.2 per cent black and 35.8 per cent white. (417a)

Based on the pupil membership during the 1970-71 school year, a student population of 63 per cent black and 37 per

[15] A number of Chesterfield County schools ranging in student enrollment from 92 to 100 per cent white became a part of the Richmond system pursuant to the annexation decree. A total school population of approximately 8,135 students, 97.5 percent of whom were white, was included within the territory acquired by the City of Richmond. Of this total, however, only 4,581 white students from the annexed area were actually enrolled in the City system as of September of 1970. (178a)

cent white was projected for the 1971-72 school year as the Richmond system prepared to operate under "Plan III." As of September 24, 1971, however, the student enrollment in the Richmond system reflected a total of 43,247 pupils with a racial composition of 69 per cent black and 31 per cent white. Of the 17,462 white student enrollment which had been projected for that year, only 13,500 actually enrolled. (417a)

Over the period from the 1954-55 school year through the 1969-70 school year, the white student population in the Richmond system fell roughly 40 per cent from a total of 20,259, or 56.5 per cent to a low of 12,622 or 29.5 per cent. (416a-417a) Even with the addition of a substantial number of white students pursuant to the 1970 annexation, the white student enrollment in the Richmond system as of September, 1971, was rapidly approaching the 1969 low.[16]

During the corresponding period, the black student population in the Richmond system increased from 15,598 to 30,097, or nearly a 100 per cent rise over the fifteen-year span. (417a)

As of September, 1971, the Richmond system with a racial composition of 69 per cent black and 31 per cent white, operated 55 facilities of which 47 were majority black. Thirty of these schools were in excess of 70 per cent black and of those, 11 were in excess of 80 per cent black. Richmond high and middle schools such as Walker, Armstrong, Kennedy, Mosby and Graves and elementary schools such as Baker, Blackwell, Fairmount, Mason and Norrell which were built as all-black schools and remained

[16] Tentative 1972-73 enrollment figures for the Richmond system apparently indicate that approximately 1,500 to 2,000 whites who attended City schools in the 1971-72 term did not return this year. This additional loss was alleviated somewhat by the enrollment of approximately 800 whites who came from Chesterfield secondary schools pursuant to the 1970 annexation decree.

all-back through 1969-70, ranged from 72 to 88 per cent black in 1971-72 notwithstanding the successive implementation of extensive plans of desegregation.

(2)

Chesterfield Schools

In the school year 1953-54, Chesterfield enrolled 9,132 students with a racial composition of 7,429 white (79.6 per cent) and 1,903 black (20.4 per cent) students. (418a)

During the 1961-62 school year, there were 85.1 per cent white and 14.9 per cent black students attending Chesterfield schools, whereas, by the 1970-71 school year, the pupil population of Chesterfield was 90.6 per cent white and 9.4 per cent black. Over that nine-year period, the total pupil membership rose from 15,596 to 24,063 even though Chesterfield lost approximately 8,000 students to the City of Richmond pursuant to the 1970 annexation.

For the 1971-72 school year, Chesterfield enrolled a total of 23,754 students with a racial composition of 21,588 white (90.9 per cent) and 2,166 black (9.1 per cent) students. (418a)

Over the period from the 1953-54 school year through 1971-72, the overall percentage of blacks in the Chesterfield school system thus fell from 20.4 per cent to 9.1 per cent.

(3)

Henrico Schools

In 1953-54, Henrico schools enrolled 13,142 students with a racial composition of 11,771 white (89.6 per cent) and 1,371 black (10.4 per cent) students. (418a)

In 1970-71, the pupil population in Henrico was 91.9 per cent white and 8.1 per cent black. Over the ten-year period from 1960-61 to 1970-71, the Henrico pupil population rose from 24,059 to 34,470. (417a)

During the 1971-72 school year, Henrico enrolled 34,317 students in 43 facilities with a racial composition of 31,299 white (91.2 per cent) and 3,018 black (8.8 per cent) students. (417a)

In the period from 1953-54 to 1971-72, the over-all percentage of blacks in the Henrico school system thus fell from 10.4 per cent to 8.8 per cent.

C.

Richmond, Henrico And Chesterfield Schools As A Metropolitan System

In 1961-62 the combined Richmond, Henrico and Chesterfield school divisions enrolled a total of 82,761 students with a racial composition of 54,948 whites (66.4 per cent) and 24,813 blacks (33.6 per cent). In June of 1971, there were a total of 106,521 students attending schools in the three divisions with an over-all racial composition of 70,664 whites (66.3 per cent) and 35,857 blacks (33.7 per cent). (418a) Although the total number of students attending schools in the combined area over the past ten years has increased by nearly 24,000, the over-all racial composition of the three divisions has varied only one-tenth of one per cent which contrasts sharply with the substantial shifts in the racial compositions of the separate divisions. The Richmond system has shifted from 57.9 per cent white in 1953-54 to a current figure of nearly 70 per cent black, while the County systems over the corresponding period have experienced substantial increases in white student enrollment and decreases in the over-all percentage of black student enrollment.

Speaking in terms of a single metropolitan school system, the Richmond, Henrico and Chesterfield area during the 1971-72 school year served approximately 103,000 students

in 132 schools with an over-all racial composition of approximately 65 per cent white and 35 per cent black students. (417a-418a)

As of June, 1972, there were approximately 36,308 black students in the Richmond, Henrico and Chesterfield systems of whom 31,149 or 85.8 per cent attended schools within the City of Richmond. Approximately two-thirds of the 31,149 or more than 20,000 black students attended 30 City schools which were in excess of 70 per cent black. These 30 City schools served approximately 56 per cent of all black students in the Richmond, Henrico and Chesterfield metropolitan area. In contrast, the County systems during the 1970-71 school year operated a total of 47 facilities which were 90 per cent or more white. (524a-529a)

For many years, Richmond, Henrico and Chesterfield have participated in joint programs designed to meet the educational needs of the entire metropolitan school community which could not otherwise have been made available by any of the divisions on a separate basis.[17]

The Richmond School Board operates two facilities located wholly, in the case of Kennedy High School, or partly, in the case of Fairfield Court Elementary, in Henrico County. Both schools historically have had all-black student enrollments. (388a)

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[17] Currently, pupils from Richmond, Henrico and Chesterfield are being transported by school buses provided by each of the three divisions to joint schools as follows: (1) branches of a cooperative training center for mentally retarded children, one of which is in northern Henrico and another of which is located in the area which Richmond gained from Chesterfield pursuant to the 1970 annexation; (2) a math-science center also located at the same facility in northern Henrico; and (3) a technical center located within the City of Richmond. (358a)

There are a number of instances where virtually all-black Richmond schools and all-white Henrico schools are located only short distances from one another.[18] (428a-429a)

4. Evidence Establishing The Continuing Effects Of The Constitutional Violations By The State And Local Authorities

Both the Richmond School Board and the plaintiffs presented detailed evidence in the District Court concerning the magnitude and continuing effects of racial discrimination in the operation of public schools as it has been practiced by the local and state school authorities both prior to and after this Court's decision in *Brown* v. *Board of Education (I)*, 347 U.S. 483 (1954). This evidence not

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[18] The following comparisons are illustrative of this phenomenon:

Richmond Schools 1970-71	*Henrico Schools 1970-71*	*Distance Miles*
Kennedy High School 93% black	Henrico High School 96.1% white	4.9
John Marshall High School 73% black	Henrico High School 96.1% white	1.4
Mosby Middle School 95% black	Fairfield Junior High School 81.9% white	3.6
East End Middle School 68% black	Fairfield Junior High School 81.9% white	3.6
Fulton-Davis Elementary 53% black	Montrose Elementary 100% white	1.8
Mason Elementary 100% black	Adams Elementary 86.4% white	3.1
Highland Park Elementary 90% black	Glen Lea Elementary 99.8% white	1.3
Stuart Elementary 91% black	Laburnum Elementary 79.6% white	2.2

only concerned discrimination in pupil assignments, but also involved discriminatory practices in school site selections and construction policies, discriminatory allocation of faculties in the individual systems, as well as a myriad number of policies and programs deliberately designed to perpetuate racial segregation for more than a decade beyond *Brown I*. Detailed evidence also was presented supporting the following lower Court findings: that the desegregation of schools within each of the three school divisions was pathetically incomplete at the time of the hearings in this case; (237a) that the State and local defendants had failed to utilize powers possessed under State law to eradicate the vestiges of the dual system of schools in the face of actual knowledge of the consequences of such inaction; (233a-235a, 258a-259a) that the opposition on the part of State and local officials to assignments of students across existing school division lines for the purpose of school desegregation was, at least in part, racially motivated; (212a, 230a, 258a) and that the State and local authorities promoted segregation through the utilization of the assignment of pupils across existing school and political subdivision boundaries as well as the employment of principles underlying the consolidation of school districts. (193a-195a, 352a-356a) Testimony and other evidence also demonstrated the causes, effects and interaction between the rigid school and housing segregation in the Richmond, Henrico and Chesterfield metropolitan area.

The District Court analyzed the voluminous evidence before it and made exhaustive findings of fact both in its earlier opinions relating to the Richmond phase of the case (1a, 110a) and with regard to the metropolitan phase in its January 5th opinion. (164a) Although many of these findings were based on uncontradicted evidence, the Court

of Appeals made no reference to the substantial majority of them.[19]

A.

STATE POLICIES AND PRACTICES

In contrast to the Court of Appeals' reliance upon Virginia's tradition of local control of its public schools, Judge Merhige made significant findings regarding this State's centralized administration of various programs designed to perpetuate segregated schools well beyond 1954. (313a-331a) Findings were made regarding the deep implication of the State school authorities in the administration of programs which were operated completely independently of the wishes of local school officials and often involved the movement of pupils across school division lines in order to perpetuate the dual system of schools. (313a-331a) Substantial sums were paid to Richmond, Henrico and Chesterfield residents in the form of tuition grants or pupil scholarships from the time of *Brown I* up until 1970 in order to avoid integration. (329a) There were also laws requiring a complete takeover on the part of State authorities in cases where any black enrolled in an all-white school. (316a-318a, 533a-536a)

The District Court found that the purposeful, centrally compelled policy of segregation was vigorously pursued in the State of Virginia for many years subsequent to this Court's 1954 declaration of the illegality of laws requiring

[19] The Court of Appeals, however, did agree with Judge Merhige's findings that there had been both state and federal action within the City of Richmond tending to entrench and perpetuate patterns of racial segregation throughout the City. (572a) The Court also agreed with the District Court's finding that there had been State action within the Counties of Henrico and Chesterfield as well which restricted the location of black residences. (572a)

such segregation in public education, and that the long-term foreseeable effect of this policy manifested itself through the persisting racial identifiability of the area's schools. (258a) The District Judge noted that even at this late date, the abandonment of such a position had been gradual, piecemeal, intentionally reluctant and was less than total. (258a) Judge Merhige further found that during this entire period, the State Board of Education had dutifully and hastily communicated to local school authorities the most recent state enactments designed to frustrate desegregation; whereas, by contrast, during the years from 1965 to date, during which the State Board in order to avoid the cutoff of federal funds had executed a compliance agreement with HEW, it had failed to disseminate to local school authorities the substance of the requirements of even the most important decisions of this Court in the field of school desegregation. (350a) The District Court found that for the major part of the 17-year period from *Brown I* to date, the State of Virginia's primary and subordinate agencies with authority over educational matters had devoted themselves to the perpetuation of a policy of racial separation in the public schools. (215a) Thus, the District Court concluded that the segregation which endured past 1954 had severely complicated the task of disestablishment and had created a situation where the elimination of racially identifiable facilities in the City and County systems had become impossible of attainment. (237a)

At the same time the State school authorities were adhering to the foregoing policy through either action or inaction on their part, the various school and governmental officials in the Richmond, Henrico and Chesterfield metropolitan area were actively discriminating against blacks in education, housing and employment.

B.

LOCAL POLICIES AND PRACTICES

(1)

Richmond

In his initial opinion in the Richmond phase of the case on August 17, 1970, Judge Merhige included a detailed set of findings indicating the degree to which freedom of choice had failed to remove the racial identity of the substantial majority of the public schools within the City system. (6a-8a) Also included within that opinion were extensive findings on the magnitude of illegal residential segregation as it existed within the City and its interrelationship with school segregation. (8a-13a) Judge Merhige specifically found that prior State laws which had required racial segregation in housing and schools, had long term effects which had not been diminished by the earlier lifting of the formal restrictions. (10a)

Thus, even though matters pertaining to the desegregation of the Richmond system had been litigated throughout the 1960's, by the end of the 1969-70 school year approximately 52,000 students were enrolled in schools within the City which were segregated in virtually the same manner as they had been in 1954.[29] Faculty and staff desegregation also had not been accomplished. (7a-8a) The District Court con-

[29] As of May 1, 1970, seven high schools were operated within the City of which three were 100 per cent black, three were 99.3 per cent, 92 per cent, and 81 per cent white and the remaining one was 68 per cent black. Also, at that time on the middle school level, two 100 per cent black schools, three others that ranged from 99.9 per cent to 69 per cent black, and three that were over 91 per cent white were operated within Richmond. On the elementary level, seventeen City schools were 100 per cent black, four others were in excess of 99.3 per cent black, two were 100 per cent white, and thirteen others ranged upward from 90 per cent white. (6a)

cluded that there was little doubt that Richmond "had not achieved a unitary system as required by law." (7a)

As noted *supra*, at p. 7, the District Court in approving the Richmond School Board's first significant plan of desegregation for the 1970-71 term, cautioned that the plan could be operated only on a temporary basis owing to the substantial number of virtually one-race schools remaining at the elementary level. During the 1970-71 year, approximately 9,000 blacks in the City system attended thirteen schools which were at least 90 per cent black; additionally, Richmond operated four all-white elementary facilities. (36a)

(2)

Chesterfield

Chesterfield schools were operated on a completely segregated basis for at least twelve years following this Court's decision in *Brown I*. During the school years 1966-67 through 1969-70, the student body at one of the County's secondary schools was 100 per cent black and its faculty over 90 per cent black, while during the 1968-69 school year there were nine schools with all-black student enrollments even though blacks in Chesterfield represented only 10 per cent of the County's total school population. (524a-526a) In July of 1968, Chesterfield was threatened with the termination of all federal aid owing to a deficient plan for desegregation of its schools, and only then did Chesterfield authorities propose a total plan of desegregation which was not to take effect until September of 1970. (382a)

In the 1970-71 school year, Chesterfield operated six elementary schools which were 99 per cent white with two of these being 100 per cent white. (526a) At the same time and against the background of a system that was less than 10

per cent black, the Matoaca Lab Elementary facility which had been operated jointly with Virginia State College remained at 99 per cent black even though it was within reasonable pairing distances of Bensley and Curtis, 99 per cent white schools. (384a-385a, 526a) Also, at that time two of Chesterfield's intermediate facilities were in excess of 97 per cent white. (525a)

In 1969-70 there were nine Chesterfield County schools without a single black on their faculty, while during the same year fourteen facilities including three of County's largest high schools had only one black faculty member. (524a-526a) Throughout the 1970-71 school year, six Chesterfield facilities were without any black faculty members and nine schools had only a single black on their staff. (524a-526a) By way of contrast, in the same year the Matoaca Laboratory School in Chesterfield had a 100 per cent black faculty. (384a, 526a)

As late as August 20, 1971, Chesterfield had a policy of receiving and transmitting State funds to Virginia State College for the support of Matoaca Lab School which at that time remained an all-black facility. Additionally, Chesterfield provided bus transportation for pupils attending that school. (386a)

The District Court also made extensive findings regarding the general discrimination which persisted in all aspects of Chesterfield practices and policies of which the following are representative: it maintained a number of inferior all-black schools even during the 1960's, and black administrators were often demoted upon the closing of such schools; (380a-382a, 377a) the Chesterfield County governing body had, as late as five years after the *Brown I* decision, stated its opposition to any integration of schools whatsoever and urged State authorities to hold the line against school

integration; (379a) through the 1969-70 school year, Chesterfield operated an all-black secondary school whose attendance zone constituted the entire County; (383a) Chesterfield political leaders openly called upon County residents to revolt rather than participate in school integration involving that County and the City of Richmond; (412a-413a) Chesterfield County has had no public housing authority; public employment in Chesterfield over the years has been available almost exclusively to whites; (510a) most Chesterfield administrative jobs are manned entirely by whites, with blacks occupying at best menial positions; (514a) and blacks in Chesterfield have settled in small, contiguous cells rather than in any widely dispersed pattern throughout the County as a whole. (511a)

(3)

Henrico

Henrico schools as well were totally segregated well into the mid-1960's. A major secondary school which served the entire County remained all-black until it was closed at the end of the 1968-69 school year. (389a) In September of 1966, Henrico school authorities informed State school authorities that the County would not cooperate with HEW in the matter of faculty desegregation. (343a) The State authorities took no action upon this notification, and in 1968 were advised by HEW that federal funds for the Henrico school system were being terminated owing to its having submitted an inadequate and ineffective plan for accomplishing the elimination of its dual school system. (344a) Only in the face of pending HEW enforcement proceedings, did Henrico finally adopt a desegregation plan which was not to commence until September of 1969.

(393a) Pursuant to its new plan, Henrico at the beginning of the 1969-70 school year closed five formerly all-black schools and black principals were generally demoted to lesser jobs. (393a-394a)

During the 1970-71 school year, Henrico still operated 14 of 30 elementary facilities with a racial composition of 99 per cent or more white with six of these remaining 100 per cent white. (529a) Against the background of a system that was less than 10 per cent black, Henrico school authorities the same year placed 40 per cent of the County's total black elementary enrollment in one school, Central Gardens, which was more than 90 per cent black and within two miles of all-white elementary schools. (395a, 529a) This concentration was not alleviated until after the commencement of the trial below (395a-396a), and the method used placed the principal burden of transportation upon the black students attending grades 1-5 at Central Gardens. At least five of Henrico's elementary schools, Crestview, Lakeside, Montross, Ratcliffe and Sandston which were built as all-white schools were still 100 per cent white during the 1970-71 term. Henrico also operated Tuckahoe Junior High which was 98.6 per cent white and Freeman High School, the County's largest, remained 99.3 per cent white during the 1970-71 school year. (527a-529a)

Even though the Superintendent of Henrico Schools admitted that one of the indicia of racial identifiability was the faculty composition of a particular school, numerous Henrico schools during the period from 1966-67 through 1970-71 were without any black faculty members whatsoever. (397a) During the 1969-70 term, twenty-three Henrico schools had only one black faculty member while four facilities had no blacks whatsoever. (527a-529a) In the 1970-71 school year the number of Henrico facilities

without any black faculty members had increased to ten, while twenty schools had only one black. (397a, 527a-529a)

Reassignment of faculty in an effort to eliminate the racial identifiability of many of the Henrico schools was not undertaken until after the County officials had been joined as parties in this case. (397a) During the 1971-72 school year, twenty-five facilities in Henrico had only one black faculty or staff member, and the District Court was unable to determine how many of these were classroom teachers. (397a)

Similar to its extensive findings of general discrimination in Chesterfield, the District Court made the following conclusions regarding Henrico: HEW officials had charged in the early part of 1968 that Henrico had made insufficient progress toward school desegregation in that County school authorities were maintaining small inadequate all-black schools and the program at the all-black secondary school was demonstratively inferior to that being offered at other schools in the system; (392a) housing patterns in Henrico were segregated, and the blacks that were able to move into that County settled principally into small colonies; (506a) Henrico County has had no public housing authority or programs, nor any rent supplement programs; (510a) and public employment in Henrico over the years has been available almost exclusively to whites. (510a)

c.

State And Local Discrimination In School Site Selection And Construction

Throughout the period from 1954 to 1971, each of the school divisions with the support and authorization of the State school authorities pursued programs and policies of

discriminatory school site selection and construction. (204a-207a) The District Court's findings with regard to City practices have been detailed elsewhere. See *Bradley* v. *School Board of City of Richmond*, 324 F. Supp. 456 (E.D. Va. 1971). With regard to the Henrico and Chesterfield systems, the District Judge made a finding that new school construction was planned for black schools years after *Brown I* without regard to the possibility of accommodating the black pupil population in white schools. (204a)

In discussing the role of the State school authorities in such policies and programs, the District Court found that decisions on school locations as well as the expansion of existing facilities in the three metropolitan systems were matters for central as well as local control. (210a) The District Judge further found that the approval of State school authorities was required for the site selection for any new facility by the various localities. (284a) Not until 1968 did the State school authorities caution all local superintendents to consider the effect on desegregation of new school construction; however, this advice was never incorporated into State procedures for review of construction proposals, and the contribution that each new proposal would have made to the elimination of the dual school system was not considered. (286a) Current State Department of Education regulations concerning school facility site selection do not, in either recommendations or binding regulations, refer to desegregation. (289a)

The Superintendent of Chesterfield schools was unaware of the 1968 memorandum distributed by the State school authorities, and the District Court found that none of the Chesterfield schools including those under construction at the time of the trial had been planned with a view toward assisting the desegregation of the various County schools

through a strategic location of the site. (312a) The District Court also concluded that Henrico school authorities had, without exception, likewise ignored desegregation requirements in planning and constructing new schools. (298a-299a)

As a result of these programs and policies pursued at both State and local levels, the District Court concluded that the perpetuation of the racial identifiability of the particular facilities while each system expanded by means of the creation of new schools planned for one race or the other, had greatly assisted in the creation of prevailing housing segregation and thereby further entrenched existing school segregation. (207a) Judge Merhige concluded that such school construction policies contributed substantially to the current segregated conditions within each of the three school systems, and specifically found that the longer term impact of the same policy had been the accentuation of the racial disproportion between the City school system and those of the two Counties. (200a) In viewing the over-all process, the District Court found that the continued operation of the schools of each subdivision as racially identifiable facilities necessarily caused each new facility and old ones as well to take on the label of a "black" or "white" school, and that this process had led to the current racial identifiability of the entire system in issue—the Richmond City system identifiable as black, and that of each County as white. (200a-201a)

The District Judge in making the above findings regarding the extensive discrimination which had been practiced by the various State and local agencies from the period following this Court's decision in *Brown I* up until the trial of this matter, concluded that the long years of the mainte-

nance of the dual system, as well as the massive and effective State-managed efforts to oppose desegregation under free choice assignment plans had caused more and more facilities in the area to become segregated by a process of white withdrawal and black occupation. (230a) These factors together with forces containing blacks in the City, were found to have produced a community school system divided into racially identifiable sectors by political boundaries. (230a) In discussing the rapid progression of racial disproportion between the City and each of the County systems, Judge Merhige found that the desegregation of Richmond as well as Henrico and Chesterfield schools could not be achieved within the current school division boundaries owing in substantial part to the long and continued deferral of plaintiffs' constitutional rights which had been deliberately practiced on the part of the appropriate State and local authorities. (207a)

5. Desegregation Plan Approved By District Court

When it initiated the metropolitan phase of this case, the Richmond School Board advised that it was preparing a desegregation plan for all schools in the Richmond, Henrico and Chesterfield metropolitan area. The amended complaint filed by the plaintiffs pursuant to the lower Court's order of December 5, 1970, included a specific request that the District Court require all defendants to prepare and submit a desegregation plan for the combined divisions as well as a prayer for relief through the consolidation of the three systems, or, alternatively, through a contractual exchange of pupils between the separate divisions. In spite of ample opportunity, however, none of the State and County defendants suggested any desegregation plan in lieu of the

one developed by the City school authorities.[21] (359a) The Richmond School Board's metropolitan desegregation plan was thus the only one before the District Court at the time of its decision.

The plan itself embodied most of the tools of desegregation specifically approved by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). The plan envisioned the consolidation of the Richmond, Henrico and Chesterfield school divisions into a single entity which would be administered and operated by a centralized school authority pursuant to provisions of State law many of which have existed at least since 1954.[22] (430a)

Under the Richmond metropolitan desegregation plan, the entire area would be divided into six geographical sub-

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[21] As early as April of 1971, in an attempt to avoid delays in the event the plan proposed by the Richmond School Board were ultimately approved, the District Court advised the State and County defendants to confer with the City school administration for purposes of resolving problems incident to the implementation of the metropolitan desegregation plan which City authorities were then preparing. During the trial in the District Court, however, it became apparent that neither the State nor County defendants had expended any effort or time in suggesting improvements to the plan or in developing any alternative proposals. It was not until after the record in his matter had been transmitted to the Court of Appeals that the State and County defendants in applying for a stay in that Court suggested an alternative method of assignment involving a contractual exchange of pupils between the three school divisions.

[22] Under laws in effect prior to July 1, 1971, at which time the Revised Constitution of Virginia and its implementing legislation became effective, the State Board of Education had the unfettered power to create school divisions comprised of more than one political subdivision. (§ 22-30; 607a) Under the current laws, however, the State Board of Education may act only upon the request of the school boards with the concurrence of the governing bodies of the affected school divisions in consolidating or otherwise altering such divisions. (§ 22-30; 617a) Where a single school division comprising more than one political subdivision has been created in this manner, the supervision of such a division must be vested in a single school board and a division superintendent selected by that board. (§§ 22-

divisions each with a student population varying from approximately 17,000 to 20,000.[23] (430a, 432a) Certain administrative and curriculum decisions would be delegated to a separate board for each subdivision. (430a)

The plan would eliminate all one-race schools in the Richmond metropolitan area with racial compositions ranging from 17 to 40 per cent black. No school in the Richmond,

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100.1, -32; 617a-618a) Current State law also requires adherence to a definitive scheme of school board representation and consolidated division administration and operation:

> specific provisions govern (1) the composition, appointment and terms of members of a school board of a division composed of two or more political subdivisions; (§ 22-100.3; 618a) (2) the qualification and duties of the consolidated division board members; (§ 22-100.4; 610a) (3) the corporate status of such a board and its general powers; (§ 22-100.5; 610a) (4) the compensation of the board members; (§ 22-100.6; 620a) (5) the transfer of title to school property; (§ 22-100.7; 620a) (6) the State Board's responsibility for promulgating rules and regulations for the financial plan of operation of the consolidated division schools; (§ 22-100.8; 611a) (7) the formula for the allocation of operating costs, capital outlay and the incurring of indebtedness for school construction; (§ 22-100.9; 621a) (8) the designation of the fiscal agent for the consolidated division; (§ 22-100.10; 612a) and (9) the effective date for the formation of the board and its assumption of the supervision and operation of all schools within the consolidated division. (§ 22-100.11; 612a)

With the exception of the statute, requiring local initiative and consent, the District Court in its January 10, 1972 order specifically directed that the creation and operation of the single school division consisting of the City of Richmond and the Counties of Henrico and Chesterfield be accomplished in conformity with these provisions of Virginia law. (538a-540a)

Current Virginia school laws contain no affirmative requirement that a school division conform to political subdivision boundaries.

[23] The exception to this general configuration is Subdivision 6 which is comprised of the southern portion of Chesterfield County, a relatively sparsely populated area containing approximately 9,000 students. (419a)

Henrico and Chesterfield division would have a racial composition substantially disproportionate to the over-all composition of the area-wide school population (65 per cent white and 35 per cent black). As a starting point in the development of the metropolitan plan, the Richmond School Board utilized this over-all ratio in attempting to formulate an effective remedy. *E.g., Swann, supra,* 402 U.S. at 24-25; *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46 (1971). The racial compositions determined for the individual facilities under the metropolitan plan were devised also with a view toward attaining a maximum degree of stability in the consolidated division.

The District Court, in referring to the ratios used by the Richmond School Board, noted that variations might be unavoidable, and further admonished all parties that it did not intend to require a particular degree of racial balance or mix. (519a) Even though (1) the ratios used were those of the City Board, (2) the Board's plan was the only one before the lower Court, and (3) the District Judge had specifically stated his readiness to entertain proposed modifications to the plan (432a, 519a-520a), as, for example, the contractual exchange of pupils in lieu of consolidation, the Court of Appeals viewed the relief as imposing a fixed racial quota and held that it was beyond the power of the District Judge to impose any particular degree of racial balance as a matter of substantative constitutional right. (570a) The Court of Appeals, in discussing the proposed racial composition of the schools under the metropolitan plan, found, however, that the evidence seemed to indicate its workability in practice. (570a) Judge Winter disagreed that the basis for the relief was a desire on the part of the District Court to achieve as much racial balance

as possible. In his view, the District Court was within its remedial equitable discretion under *Swann* in considering racial ratios as a part of the relief decreed. Judge Winter found that the range of racial ratios among the various subdivisions of the consolidated division, as well as among the various schools within the subdivisions, was sufficient proof that the basis of the majority's opinion was without support. (602a)

The substantial majority of students would attend a school located within the particular subdivision wherein they reside, and in no case would there be assignments between non-contiguous subdivisions. Approximately 36,000 students would be exchanged between the City system and the two Counties, with about 1,000 more whites than blacks being involved in this central city-suburban exchange. (423a) No exchange is contemplated between students residing in the more rural portion of southern Chesterfield (Subdivision 6) and those in the City of Richmond. (425a-426a)

Approximately 68,000 pupils were transported to school by yellow buses by the three school divisions operating independently during the 1971-72 school year. Under the metropolitan desegregation plan, approximately 78,000 students would be transported from home to school, with 42,000 of these attending schools in their neighborhood zone of residence. (423a)

Also, during the 1971-72 school year the three school divisions operated a total of over 600 yellow buses, and of this amount only 524 would be necessary to meet the transportation requirements of the metropolitan plan. (424a) Travel times and distances compare favorably with those experienced presently in each of the three school divisions

ndependently. (422a-424a) The State and County defend-nts conceded, and the Court of Appeals agreed, that this as not a busing case. (563a, n.2)

REASONS FOR GRANTING THE WRIT

Introduction

The Richmond School Board submits that this case merits eview on certiorari for two principal reasons. First, as is emonstrated in Part I, the decision of the Court of Appeals annot be reconciled with either applicable decisions of this ourt or the rationale of other federal courts in dealing ith related issues.

Secondly, as developed in Part II, issues of critical sig-ificance with respect to school desegregation in *de jure* etropolitan areas are presented. The manner in which ese questions are resolved will be largely determinative of e effectiveness of relief afforded in these areas.

I.

he Decision Of The Court Of Appeals Is Irreconcilable Both With Applicable Decisions Of This Court And With Rationale Utilized By Other Federal Courts In Related Cases.

The incompatibility of the opinion of the Court of ppeals with decisions of this Court manifests itself in ree significant areas: the standard for assessing the nctity of existing school division lines and the existence a constitutional violation; the drastic limitations placed previous guidelines established by this Court for the olding of effective relief; and the significant departure om the accepted standard of review in school desegrega-on cases.

Furthermore, the reasoning employed by the Court of Appeals is at odds with that of other federal courts which have considered similar issues.

A.

COURT OF APPEALS' TEST FOR ASSESSING THE SANCTITY OF EXISTING SCHOOL DIVISION LINES AND THE EXISTENCE OF A CONSTITUTIONAL VIOLATION IS PREDICATED ON A JUDICIAL STANDARD EXPRESSLY REJECTED BY THIS COURT

It is clear that in evaluating the sanctity of the existing school division lines in this case, the Court of Appeals as it had done in *Wright* v. *Council of City of Emporia*, 442 F.2d 570, 572-74 (4th Cir. 1971) and *United States* v. *Scotland Neck City Board of Education*, 442 F.2d 575, 577, 582 (4th Cir. 1971), focused on the purpose and motivation underlying the initial establishment and maintenance of such lines:

> "It is not contended by any of the parties or by amici that the establishment of the school district lines more than 100 years ago was *invidiously motivated*. We have searched the 325-page opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of the three local governmental units have been maintained either long ago or recently for the *purpose* of perpetuating racial discrimination in the public schools." (571a) [emphasis added]
>
> "But neither the record nor the opinion . . . even suggests that there was ever joint interaction between any two of the units involved (or by higher state officers) for the *purpose* of keeping one unit relatively white by confining blacks to another." (572a) [emphasis added]
>
> "The facts of this case do not establish . . . that state establishment and maintenance of school districts coterminous with the political subdivisions of the City

of Richmond and the Counties of Chesterfield and Henrico have been *intended to circumvent* any federally protected right." (580a) [emphasis added]

Having found no such invidious purpose or motivation, the Court of Appeals concluded there was no constitutional violation, hence the District Court was without authority to act. (581a)

This Court in *Wright* v. *Council of City of Emporia*, ... U.S. ....., 92 S.Ct. 2196 (1972), however, made it clear that "effect" was controlling and that any inquiry into purpose or motivation was as irrelevant as it was fruitless in that the existence of permissible purposes cannot otherwise sustain actions that have an impermissible effect. *Emporia, supra*, 92 S.Ct. at 2203.

By way of contrast, the Court of Appeals made only an enigmatic reference to the "consequence" of the maintenance of the three separate school divisions[24] (580a) and failed even to allude to the lower Court's extensive findings as to the crippling effects of holding existing school division lines inviolate with regard to the disestablishment of the dual school system in Richmond community. Although the Court of Appeals did not have the benefit of this Court's decisions in *Emporia, supra*, and *United States* v. *Scotland Neck City Board of Education*, ... U.S. ..... 92 S.Ct. 2214 (1972), at the time of its decision, its opinion, if allowed to stand, would constitute a significant departure

[24] The Court of Appeals concluded that there was no "unconstitutional consequence" of the maintenance of the Richmond, Henrico and Chesterfield school divisions as separate entities in that there was no federally protected right to racial balance within even a single school district. (580a) In so holding, the Court of Appeals failed to refer to the abundance of lower Court findings regarding constitutional violations by the State and local defendants nor did it mention the remedial guidelines established in the most significant decisions of this Court. See *infra*, at pp. 40-44.

from the now well-established "effect oriented" standard of judicial inquiry applicable to this and related cases.

B.

COURT OF APPEALS' JUDGMENT EFFECTIVELY THWARTS THE GUIDELINES FOR THE MOLDING OF EFFECTIVE RELIEF AS ESTABLISHED IN PRIOR DECISIONS OF THIS COURT

As this Court noted in *Emporia, supra*, 92 S.Ct. at 2202, the Court of Appeals apparently did not consider that case to be governed by the principles of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). The same general critique is fully applicably to its decision here in that the Appellate Court failed to reconcile its conclusions with no less than four key objectives previously established by this Court. Instead, the application of its rationale places rigid limitations on these guidelines with dire consequences to the future of school desegregation in *de jure* metropolitan areas.

"Effectiveness" has been firmly established as the measure of any desegregation plan.[25] Yet under the decision of the Court of Appeals, irrespective of its relative effectiveness, the alternative metropolitan desegregation plan involving assignments across existing school division lines, was adjudged to have been beyond the scope of the lower Court's remedial power absent proof of invidious racial purpose or motivation in the establishment or maintenance of those lines. The District Court's conclusions as to the relative effectiveness of the metropolian plan were not disputed by the Court of Appeals which, instead, noted that in his concern for effective relief the District Judge had

[25] *E.g., Davis, supra*, 402 U.S. at 37; *Wright* v. *Council of City of Emporia*, 92 S.Ct. 2196, 2203 (1972).

overlooked limitations upon his remedial powers. (563a) If after years of extensive litigation the relief which has been afforded consists of no more than the establishment of a substantially all-black system in the face of a viable and feasible alternative which promises realistically to work in providing equal educational opportunity, the promises of *Brown I* will in reality have little meaning to school children in the Richmond, Virginia community.

This Court also has made it clear that the objective in the development of any desegregation plan should be the attainment of the greatest possible degree of actual desegregation and the elimination to the extent feasible of all vestiges of the dual system of schools.[26] Again, the overwhelming evidence accepted by the District Court was that attempts to desegregate within the City limits of Richmond were futile exercises doomed to failure which paled in comparison to the realistic expectations provided by the City Board's metropolitan plan. (207a-208a, 230a, 237a, 239a-240a) The consequence of the judicial standard adopted by the Court of Appeals, however, presents a stark contrast between what will and what could occur: the promise of substantially all-black schools within the City surrounded by substantially all-white schools in the Counties with the attendant community and student perceptions of "black" and "white," inferior and superior, schools, compared with the District Court's remedy which promises realistically to erase the racial identifiability off schools in the area and to remove all vestiges of the dual school system which do in fact persist in the Richmond metropolitan area today.

This Court has also made it clear that in desegregating schools district courts and school authorities as well have

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[26] *Davis, supra*, 402 U.S. at 37; *Swann, supra*, 402 U.S. at 15; *cf. Green, supra*, 391 U.S. at 437-38.

a duty to consider all available options and alternatives, selecting the plan which holds the greatest expectation of working in practice. *See, e.g., Green, supra,* 391 U.S. at 439. This mandate was limited by the Court of Appeals, however, to the extent that the District Judge could not consider alternatives which involved either the inter-divisional exchange of pupils or the consolidation of school districts even though he had found compelling factors and circumstances requiring such relief.

Regarding such available alternatives, it is important to note that Virginia law has never forbidden the contractual exchange of pupils between separate school divisions and for many years there has been a legislatively conceived plan for the consolidation of school districts consisting of more than one political subdivision. (227a-229a, 607a-613a, 618a-621a) Even though the present law requires the consent of the local governing bodies and school boards prior to a consolidation, (228a, 617a) it is axiomatic that the enjoyment of fundamental constitutional rights cannot be made to depend upon popular consent[27] and that state laws which serve as impediments or barriers to the effective disestablishment of dual school systems are not binding on a district court formulating effective relief.[28] Moreover, the lower Court simply required and ordered the State and County defendants to exercise powers which have been expressly granted to them by State law. (538a-540a)

Similarly, the Court of Appeals made no reference to the statements of this Court to the effect that the most potent

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[27] *E.g., Lucas* v. *Forty-Fourth Gen. Assembly of Colorado,* 377 U.S. 713, 736-37 (1964); *Haney* v. *County Bd. of Educ. of Sevier County,* 410 F.2d 920, 925 (8th Cir. 1969).

[28] *North Carolina State Bd. of Educ.* v. *Swann,* 402 U.S. 43, 45 (1971).

weapons for the dismantling of dual school systems lie in the revision of school districts and attendance areas. *Brown* v. *Board of Education (II)*, 349 U.S. 294, 300-01 (1955).

From the analogy which this Court has drawn between the molding of relief in school desegregation and antitrust cases,[29] it is clear that the plan should, to the extent feasible, prevent the reoccurrence of the evils sought to be corrected. The District Court, concerned over the resegregation of the City system, found ample support in the evidence establishing a 35 per cent loss of white students within 12 months under the two-Richmond only desegregation plans. Yet the Court of Appeals without even alluding to the District Judge's conclusion as to the lack of any chances for effective relief within the City system, established a standard which as applied to this case will insure a return to the situation which existed in 1954, i.e., substantially all-black center-City schools surrounded by substantially all-white schools in the suburbs.

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[29] As this Court has made abundantly clear with regard to the techniques to be employed in the construction of equitable remedies, the duty of a court is to fashion a remedy which not only eradicates the effects of past evils, but also insures the prevention of the continuation or repetition of discriminatory practices in the future. *Louisiana* v. *United States*, 380 U.S. 145, 154, 156 (1965). That this doctrine is particularly applicable in school desegregation cases is evidenced by a parallel drawn in *Green* between remedial techniques appropriate in remedying illegal school segregation and those utilized in various antitrust cases. *Green, supra*, 391 U.S. at 438, n. 4. In this regard, it should be noted that in the area of antitrust remedies, this Court has been careful to point out that in order to be entitled to relief, the complaining party need only show that the existing decree leaves a substantial likelihood that the practice condemned has not been satisfactorily eliminated. *United States* v. *E. I. duPont De Nemours & Co.*, 366 U.S. 316, 331-32 (1961). It is thus apparent that this Court in determining the appropriate scope of relief in a desegregation case, saw the need for a decree which would not only insure the eradication of all the vestiges of the past unlawful segregation, but also preclude the revival of such effects.

If the remedial guidelines established under this Court's prior decisions have no more meaning than the decision of the Court of Appeals foretells, such a pronouncement should be made by this Court

C.

COURT OF APPEALS' DECISION WAS BASED ON "NEW" FINDINGS ACHIEVED THROUGH A SIGNIFICANT DEPARTURE FROM THE STANDARD OF APPELLATE REVIEW IN SCHOOL DESEGREGATION CASES

This Court has made it clear that the weighing of facts and circumstances to determine their effect upon the process of desegregation is a delicate task that is aided by the sensitivity of the trier of facts to local conditions, and that the judgment with respect thereto is primarily the responsibility of the District Court.[30] From a comparison of the Court of Appeals' opinion with the record, however, it is clear that in critical areas, the Appellate Court substituted its evaluation of the evidence for that of the District Judge. The nature of this petition allows reference to only a few examples.

In concluding that the desegregation of schools by the three school districts involved was pathetically incomplete, (237a) the District Court had considered voluminous evidence relating to the actual operation of the Richmond, Henrico and Chesterfield schools for many years including the term which had concluded in June of 1971, approximately two months prior to the hearings below.

In phrasing the issue in its terms, the Court of Appeals in the initial paragraph of its opinion implicitly assumed the operation of unitary systems by all three school divisions

[30] *E.g., Council of City of Emporia, supra*, 92 S.Ct. at 2205, *citing Brown II, supra*, 349 U.S. at 299.

involved.[31] (562a) However, no party, including the Richmond School Board, contended that the City had achieved a unitary system during the 1970-71 school year. The basis for such an assumption by the Appellate Court is thus unclear. Moreover, as is implied in subsequent portions of its opinion, the Court of Appeals agreed that neither Henrico nor Chesterfield had attained a unitary system during the 1970-71 year, the last school year for which data was available. The Appellate Court stated that with the discontinuation by Chesterfield of its connection with Matoaca Laboratory School (which occurred subsequent to the 1970-71 school year)[32] and Henrico County's announced plan to reassign the 40 percent of its total black elementary enrollment which had attended Central Gardens during the 1970-71 school year, the systems had become unitary. (571a-572a) Remarkably, the Court of Appeals made this assumption without reference to any of the other non-unitary features considered by the District Judge such as the racial identifiability of faculties and the gross examples of racial isolation in other schools (384a, 397a, 524a-529a), and, indeed, without the benefit of relevant data subsequent to the 1970-71 school year.

It is apparent from the opinion of the Court of Appeals that it was troubled by the size of the proposed consolidated school district and by problems of finance and budgeting

[31] In Judge Winter's view, he probably would not have dissented "were the case as simple as described in the opening paragraph of the majority opinion. . . ." (585a, n. 1)

[32] During the hearings below, Chesterfield school authorities announced they would discontinue participation in the joint operation of the all-black Matoaca Laboratory School to the extent required to remove this non-unitary facility from their system. The record fails to disclose what changes were made as to the operation of that facility subsequent to the 1970-71 school year, and the fact of its continued operation by some other State agency in lieu of Chesterfield passed without comment by the Court of Appeals. (385a-386a)

which in its opinion were sufficient to "boggle the mind." (578a) Suffice it to point out that after weighing the extensive evidence presented on all such aspects of the proposed metropolitan desegregation plan, the District Court concluded that the optimal size of any school district was largely dependent on the objectives sought to be obtained (having before it evidence of the eminently successful operation of the Fairfax, Virginia school system consisting of more than 135,000 students), and that in all respects the weight of the testimony from the educational experts established that the proposed plan was reasonable, feasible and workable. (432a) In addition, the District Court had considerable evidence before it that many of the very features that the Court of Appeals found disturbing had proved workable in the operation of State-authorized joint schools as well as all-black regional schools; (352a-356a) indeed, the existence of detailed Virginia laws governing the operation of school divisions consisting of more than one political subdivision (608a-613a, 618a-621a) surely indicates that such problems were not considered insurmountable by this State's own lawmakers. The Richmond School Board is unaware of any school desegregation case to date which upholds the substitution by an appellate court of *new* conclusions regarding elements of the feasibility of desegregation plans when substantial evidence supports contrary findings made by a district court.

In other instances, the Court of Appeals seized upon one item of evidence relating to a certain point and drew conclusions different from those of the District Court without reference to any of the other evidence on the same issue. As a significant example, the Appellate Court focused upon the testimony of one County official relating his interpretations of the findings of a questionnaire submitted to

students to determine the number who had previously attended the City schools. The testimony, designed to establish that relatively few County students ever had attended Richmond schools, convinced the Court of Appeals that the evidence failed to establish that the City's white students were fleeing to County schools. (573a) On this issue, the District Court had weighed a considerable amount of evidence establishing the losses of whites from the City system including the testimony in question and, with respect to the results of the specified questionnaire, the record indicated that the official was unable to give any detailed information as to the scope, extensiveness and degree of participation by County students. In addition, the Superintendent of the County involved had previously admitted that his staff had been confronted with the problem of white parents and students from Richmond giving false County addresses and renting unoccupied apartments for the purpose of gaining admission to the substantially all-white schools in the County. (383a) Certainly, it is doubtful that students engaging in such activities would candidly answer any questionnaire exposing their actions. Further, the questionnaire obviously failed to reflect the degree of white attrition occasioned by parents moving to the Counties so that their children could be initially enrolled in County schools. This further explanation of the record upon which the District Court relied is fully illustrative of the danger inherent in any departure from the accepted standard of judicial review of factual determinations.

On the question of the effects of admitted racial discrimination by all three political subdivisions in housing and the admitted refusal of the Counties to take steps necessary to allow the construction of low-cost or rent-subsidized housing, the Court of Appeals concluded that it was "unable to

determine whether such discrimination, practiced in all three units, has had any impact upon movement by blacks out of the city and into the counties." (574a)

The District Court's conclusions in this area were predicated on voluminous evidence and testimony providing a reasonable basis for its determinations that discrimination in housing, school site selection and construction, public employment, and County inaction in failing to provide low-cost housing had operated to contain blacks within the City of Richmond and had served to accentuate the extreme racial disparity between the City and the Counties. (195a-211a)

These illustrative intrusions upon the normal standard of appellate review pose significant consequences in the handling of school desegregation cases and merit review by this Court.

D.

COURT OF APPEALS' RATIONALE VARIES WITH THAT UTILIZED BY OTHER FEDERAL COURTS IN RELATED CASES

Though factually distinguishable, the issues presented herein are closely akin to those dealt with in *Emporia* and *Scotland Neck* as well as other cases dealing with the attempted creation of splinter school districts. After pointing out that it was unfortunately predictable that a court which had approved the dismantling of existing school districts so as to create smaller whiter enclaves had now rejected the consolidation of school districts to make effective the mandate of *Brown I* and its progeny, (585a-586a) Judge Winter made the following comparison:

> "While the district court attempted to distinguish these cases, the fact is that they are simply the obverse of the same coin which is presented here. In each of *Scotland Neck* and *Emporia*, the effect of splitting the

school district was further to delay and hinder the achievement of what would otherwise have been a unitary system in the original district, although arguably there were noninvidious reasons for subdividing. Here, as I view the case, the question is one of consolidating school districts *within the framework of state law* in order to eradicate the effects of past discrimination and to achieve a unitary system. Logically it is impossible to sustain the former and not condemn the converse." (585a, n. 1)

As noted by this Court in *Emporia*, the reasoning of the Court of Appeals differed materially from that utilized by other federal courts which had prohibited the carving out of "white enclaves" based not on the motive or purpose underlying the actions taken by the respective school authorities, but on the *effect* of such practices.[33] As pointed out, *infra*, at p. 53, other federal courts currently wrestling with problems of metropolitan school desegregation are similarly focusing on effect. If the Court of Appeals' decision is left undisturbed, the result would be productive of the following incongruity: that in the splinter district cases the actions of State and local school authorities would be judged in terms of their effect on the dismantling process, whereas such a test would be irrelevant in prescribing the circumstances under which a district court may require either the assignment of students across existing school division lines or the merger of existing districts in accordance with provisions of state law in order to alleviate the

[33] *Council of City of Emporia, supra*, 92 S.Ct. at 2203, *citing Lee* v. *Macon County Bd. of Educ.*, 448 F.2d 746, 752 (5th Cir. 1971); *Stout* v. *Jefferson County Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971); *Haney, supra*, 410 F.2d at 924; *Burleson* v. *County Bd. of Election Comm'rs.*, 308 F.Supp. 352, 356 (E.D. Ark), *aff'd*, 432 F.2d 1356 (8th Cir. 1970); *Aytch* v. *Mitchell*, 320 F.Supp. 1372, 1377 (E.D. Ark. 1971)

effects of past discrimination. The criteria should be the same, however, since in both instances the school boundaries affect the dismantling process by serving as barriers to effective desegregation.

The severe limitation on the remedial powers of the District Court occasioned by the Court of Appeals' reliance on both Virginia tradition and the Tenth Amendment to the Constitution of the United States to sanctify existing school division lines (575a-580a) is in sharp contrast with the view of the United States Court of Appeals for the Eighth Circuit as expressed in *Haney* v. *County Board of Education of Sevier County*, 410 F.2d 920, 924-25 (8th Cir. 1969):

> "If segregation in public schools could be justified simply because of pre-*Brown* geographic structuring of school districts, the equal protection clause would have little meaning. . . .
>
> State legislative district lines, congressional district and other state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . . (*citing Gomillion* v. *Lightfoot*, 364 U.S. 339 [1960])
>
> Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights." (*citing Reynolds* v. *Sims*, 377 U.S. 533 [1964]; *Hall* v. *St. Helena Parish School Bd.*, 197 F.Supp. 649, 658 [E.D. La.], *aff'd*, 287 F.2d 376 [5th Cir. 1961], *aff'd per curiam*, 368 U.S. 515 [1962])

The Court of Appeals made no reference to the District Court's finding that the existing school division lines were redrawn as late as July 1, 1971, pursuant to the requirements of the revised State Constitution which took effect on the same date. (229a) This express reaffirmance of the

esent school division lines had the uncontradicted effect a state-approved separation of an existing 70 per cent ck school division (Richmond) from the two 90 per cent ite school divisions surrounding it. Furthermore, this drawing occurred at a time when the State was under a ar and continuing duty to take whatever steps might be cessary to eradicate all vestiges of its dual system of ools.[24] The failure of the Court of Appeals to even nsider this a proper point of inquiry cannot be squared th the rationale of the Eighth Circuit in *Haney* that [I]t would be sheer fantasy to say that the school districts Sevier County could be realigned today in the same nner that they were in 1948 and still comply with the nstitutional mandate of *Brown I* and *Brown II*." *Haney*, *ra*, 410 F.2d at 924.

With regard to the force and effect of Virginia's consent uirement regarding the consolidation of separate school tricts, the Court of Appeals mistakenly felt it necessary hold such a limitation unconstitutional if the plan ap-ved by the lower Court were to be affirmed. (575a, 577a-a) In so doing, it ignored the basic constitutional tenant t the enjoyment of rights under the Fourteenth Amend-nt cannot be made dependent on popular consent.

> "The argument that 'equal protection' rights must depend upon the majority vote has never found foothold under our form of constitutional government. Democratic government under our Constitution respects the majority will, but our forefathers had sufficient vision to insure that even the many must give way to certain

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See, e.g., Smith v. *North Carolina State Bd. of Educ.*, 444 F.2d (4th Cir. 1971); *United States* v. *Jefferson County Bd. of Educ.*, F.2d 836, 846-47 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *denied*, 389 U.S. 840 (1967); *United States* v. *Texas*, 321 pp. 1043, 1052 (E.D. Tex. 1970), *aff'd* 447 F.2d 441 (5th Cir.), *cert. denied*, 92 S.Ct. 675 (1972).

fundamental rights of the few." *Haney, supra*, 410 F.2d at 925.

Also ignored by the Court of Appeals was the settled principle that the remedial powers of a district court cannot be limited by provisions of state law. *Haney, supra; United States* v. *Greenwood Muncipal Separate School District*, 406 F.2d 1086, 1094 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969).

Resolution of these fundamental variances in approach is urgently needed. Indeed, if the rationale utilized by the Court of Appeals here is accepted by this Court, the numerous federal courts currently wrestling with detailed issues concerning metropolitan school desegregation would need to make only the threshold inquiry as to purpose and motivation in the establishment of existing school division lines. If no such invidious purpose or motivation were shown, the courts and school authorities would be spared the time-consuming, detailed inquiry made by the District Court in this case; however, as pointed out *supra*, at pp. 40-44, an affirmance of the Court of Appeals would require substantial modification of the remedial guidelines which this Court has previously established.

II.

This Case Presents Issues Of Critical Significance With Respect To Future School Desegregation

This Court has not as yet established definitive guidelines as to the circumstances under which pupil assignments across existing school district lines may be required or the circumstances under which such lines may or must be altered to insure the complete and effective eradication of all ves-

tiges of a state-mandated dual system of schools.[25] Since a number of lower courts are confronted with related questions at the present time,[26] the manner in which the issues

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[25] The Chief Justice of this Court recognized the need to resolve this particular issue over two years ago in stating that "[a]s soon as possible . . . we ought to resolve some of the basic practical problems when they are appropriately presented including . . . to what extent school districts and zones may or must be altered as a constitutional matter. . . ." *Northcross* v. *Board of Educ. of Memphis, Tenn. City Schools*, 397 U.S. 232, 237 (1970) (concurring opinion).

[26] Issues relating to relief from central city school segregation based on a metropolitan area-wide approach are not unique to this case. Other district judges have specifically held that desegregation plans confined to central cities alone could not realistically provide the type of relief required under this Court's decisions in *Green* and *Swann*. While there are many other of such cases in various stages of litigation, only a few of the major ones are discussed here.

In a suit involving the Detroit, Michigan school system, the District Court found that relief from school segregation could not be effectively provided by any of the intra-city plans which had been presented to it, and that the only realistic plan for desegregation of the City system would require the assignment of students between a number of city-suburban school districts existing in the Detroit metropolitan area. *Bradley* v. *Milliken*, No. 35257 (E.D. Mich. S.D. March 24 and 28, June 14, 1972). *See also Bradley* v. *Milliken*, 338 F.Supp. 582 (E.D. Mich. S.D. 1971) (findings as to illegal school segregation existing within Detroit school system which necessitated judicial intervention). In a similar suit brought to desegregate the schools of Indianapolis, Indiana, the District Judge there found that the city schools were illegally segregated, that any plan of desegregation confined to the city system alone would not work in affording a realistic remedy, and that suburban school districts in the Indianapolis metropolitan area would have to be joined as parties to the action. *United States* v. *Board of School Comm'rs. of City of Indianapolis*, 332 F.Supp. 655 (S.D. Ind. 1971). Also, this Court has refused to hear questions presented by one of the newly joined suburban school districts regarding the propriety of the joinder action. *School Town of Speedway* v. *Dillin, cert. denied*, ... U.S. ....., 92 S.Ct. 2457 (1972). Similar questions have arisen in a case involving the Atlanta, Georgia school system. See *Calhoun* v. *Cook*, 332 F.Supp. 804 (N.D. Ga. 1971), where the District Court noted that at the time the case was originally filed in 1958, the Atlanta system was approximately 70 per cent white whereas at the time of its decision, there had been a complete reversal

presented here are resolved will be largely determinative of the effectiveness of desegregation not only in Richmond, Virginia, but in many other *de jure* metropolitan areas as well.

A.

THE EXTENT TO WHICH EFFECTIVENESS OF RELIEF IN DE JURE METROPOLITAN AREAS MAY BE DEPENDENT UPON THE MANNER IN WHICH A STATE HAS ELECTED TO ALIGN ITS LOCAL SCHOOL DIVISIONS

In Virginia, North Carolina and Alabama, states with a history of state-mandated systems of segregated public schools, there is no uniformity in the interrelationship between school division and political subdivision lines. In Charlotte, North Carolina, and Mobile, Alabama, each respective school division includes the urban core city along with the surrounding suburban county. The cities themselves are but a part of a larger political subdivision which encompasses the entire metropolitan area involved. On the other hand, Virginia is unique in that Richmond and, indeed, all of its cities are separate political subdivisions which under State law have the right to operate separate school systems.[37]

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in percentages in that the system was then 70 per cent black. *Calhoun, supra*, 332 F.Supp. at 805. The United States Court of Appeals for the Fifth Circuit has specifically directed that the District Court make supplemental findings of fact and conclusions of law with regard to suggestions made by the latter concerning the desirability of a metropolitan area solution to the increasing segregation within the Atlanta system. *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971).

On August 24, 1972, the United States Court of Appeals for the Sixth Circuit conducted hearings on the relief decreed for the Detroit metropolitan area, and the matter is currently under advisement.

[37] Va. Code Ann., § 22-93 (Repl. Vol. 1969), cited in *Council of City of Emporia, supra*, 92 S.Ct. at 2199. In other *de jure* states, school district lines are not necessarily coterminous with political subdivision boundaries. *See, e.g., Haney, supra; United States* v. *Texas, supra.*

In all three cities mentioned, the overwhelming percentage of black citizens live within the city limits ringed by substantially all-white suburban areas.

In upholding the District Court in Charlotte, this Court approved a desegregation plan projecting a racial composition under which substantially all schools in the Charlotte-Mecklenburg metropolitan area would range from 9 to 38 per cent black. *Swann, supra.* In *Davis*, this Court rejected attempts by Mobile school authorities to rely upon a natural geographical barrier as a basis for effectively confining the majority of black students in that metropolitan area to substantially all-black schools in the core city. In both Charlotte and Mobile, the racial composition of schools now bears a reasonable relationship to the racial composition of the entire metropolitan school population.

In the Richmond metropolitan community, however, 85 per cent of all black students attend schools within the City system ringed as it is by the two County systems each of which is at least 90 per cent white.

The District Court found that, viewed in its metropolitan setting, the Richmond school system was clearly identifiable as black and those of Henrico and Chesterfield as white, (201a) and that additional white attrition from the Richmond system facilitated by the close proximity of the substantially all-white County systems could reasonably be anticipated. (209a-210a)

Though conceding that the evidence indicated the workability of the racial compositions envisioned in the City School Board's metropolitan desegregation plan, the Court of Appeals nevertheless held that in its concern for effective relief, the District Court had exceeded its powers in ordering the implementation of the plan in the absence of a specific finding of invidious racial motive or intent in the

establishment or maintenance of the existing school division lines. Absent such findings, the Court of Appeals held in effect that the Tenth Amendment permitted Virginia to adhere to its particular scheme of school division alignment even though a more effective plan for the elimination of all the vestiges of the dual system of schools in the Richmond metropolitan area was thereby precluded.

The record establishes that in a few short years Richmond will have a substantially all-black school system surrounded by two substantially all-white systems—in sharp contrast to the more effective plans of desegregation under which schools in the Charlotte and Mobile metropolitan communities are currently operating.

In having sanctioned the maintenance of virtually all-black and all-white school systems in the Richmond metropolitan community with its history of *de jure* segregation in public education, the Court of Appeals has implicitly approved of a different standard of equality based on the manner in which this State has chosen to align its school divisions. Because school boundary lines must confrom to the three political subdivisions in the Richmond metropolitan area, patterns of school segregation, racially identifiable schools and inherent educational inequalities prohibited by this Court in the Charlotte and Mobile metropolitan areas are allowed to persist in this community.

Thus, the marked polarization of black and white children attending schools in the Richmond metropolitan area will serve as the antithesis of the effective integration which, owing to the implementation of school desegregation plans approved by this Court, enjoys current vitality in similar metropolitan areas. This bizarre result stems from a sanctity accorded to existing state-created lines not permitted in cases where other Fourteenth and Fifteenth Amendment

rights have been involved,[38] and provides more than a sufficient basis for this Court's review of the decision below.

Under the decision of the Court of Appeals, we are left with the undeniable fact that the measure of relief from school segregation afforded students in the Richmond metropolitan area pales in comparison to that currently enjoyed in both the Charlotte and Mobile metropolitan communities. Furthermore, there is a noticeable absence of any sound constitutional basis commending such a result. It flows only from the crippling limitation placed upon the remedial powers of the District Court through the application of an overly restrictive standard adopted by the Court of Appeals. Though the State is the relevant unit of equality under the Fourteenth Amendment, the degree of effectiveness of relief within a particular geographical area of a state should rest on the feasibility of viable alternatives available and not on the happenstance of variances in school division alignment. Since the state-mandated system of dual schools was the evil struck down in *Brown I*, it would indeed be ironical if one of the recalcitrant states could in fact effectively segregate thousands of its black school children owing to a fortuitous alignment of school divisions regardless of the existence of feasible and viable alternatives.

The development of more definitive guidelines as to the circumstances under which school district lines may be crossed, revised or altered to insure effective relief from the remaining vestiges of a dual school system thus is urgently

[38] This Court has steadfastly refused to allow political subdivision any other state-created lines to control the effective exercise of ndamental constitutional rights unrelated to school desegregation. g., *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (legislative district es); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) (congressional dist lines); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) (political bdivision lines).

needed so as to preclude the divergent results possible when, as under the effect of the Court of Appeals' decision, relief may be made dependent upon the manner in which a state has elected to align its local school divisions.

B.

UNDER WHAT CIRCUMSTANCES THE REMEDIAL POWER OF A DISTRICT COURT MAY BE LIMITED BY EXISTING SCHOOL DIVISION LINES

The Court of Appeals established the standard that, regardless of the relative effectiveness of alternative desegregation plans presented, the remedial power of a district court cannot extend beyond existing school division lines absent a showing of a racially discriminatory purpose in the establishment or maintenance of said lines or of evidence establishing joint interaction by any two of the three school divisions involved for the purpose of keeping one school system relatively white by confining blacks to another, and that in the absence of such invidious intent, there was no constitutional violation and no power to act on the part of a lower court.

CIRCUMSTANCES RELIED UPON BY THE DISTRICT COURT

The standard applied by the District Court was predicated on the remedial guidelines established by this Court in *Brown II*, *Green*, *Swann* and *Davis*, requiring the elimination of all vestiges of a system of dual schools by the most effective alternative or plan available under the facts and circumstances of the particular case. In the judgment of the District Court, these mandates required an overview of the totality of a myriad of factors. The following are the most significant circumstances leading the District Court to conclude that its remedial power was not restricted by the existing school division lines:

1.

Interdependence Between Richmond, Henrico And Chesterfield And The Inevitable Effects Thereof On Community And Student Perceptions

The evidence established, in the judgment of the District Court, the conclusion reached by all independent consultants who had studied the three political subdivisions involved, i.e., the existence of a strong economic, cultural and social interdependence and community of interest between the City of Richmond and the Counties of Henrico and Chesterfield, the lack of any distinctive geographical boundary lines dividing the three jurisdictions, and, indeed, the artificial and transitional nature of the lines which do exist. The factors substantiating such conclusions have been summarized in the Statement, *supra*, at pp. 13-14.

Expert testimony from Southern educators as well as the District Court's own intimate knowledge of local conditions led it to conclude that even though students attending schools in the Richmond metropolitan community would prepare for citizenship and pursue their vocational, cultural and social goals in a community with a historically stable racial composition of approximately two-thirds white and one-third black, that, absent assignments across the existing school division lines, these school children would be attending identifiable black schools in the City and white schools in the two surrounding counties. (436a, 469a-474a)

Based upon the testimony of these educators in applying to the situation in the Richmond metropolitan area this Court's previous findings in *Brown I, supra*, 347 U.S. at 493-95, regarding the adverse effects on the perception and motivations of students caused by segregation, the lower Court concluded: (1) that the development of attitudes and values as a purpose of public education was equally as im-

portant as and inextricably interwoven with the other acknowledged purpose of education, i.e., the teaching of academic skills; (2) that in a biracial community such as the Richmond area, meaningful integration was an essential element of quality education and equal educational opportunity; and (3) that meaningful integration, to the extent feasible, was as vitally important for white students as for blacks. (261a, 469a-478a) The District Court accepted the detailed reasons given by these experts as to why the invidious effects of segregation on the perception and motivation of students cannot be eradicated in the Richmond metropolitan community unless pupils are assigned across the existing school division lines. (477a-478a)

2.

Proof Establishing Lack Of Sanctity Or Compelling Interest In The Maintenance Of Existing School Division Lines

The District Court's finding that there was no overriding State interest in maintaining the existing school division lines as inviolate was rooted in proof of the history of previous treatment of these boundaries on the part of the State and local school authorities.

Supporting the District Judge's conclusion that there was no compelling interest in the maintenance of the existing school division lines as assignment barriers was a plethora of evidence showing the State's complete disregard of both political subdivision and school division lines with respect to the assignment of pupils in establishing, maintaining and perpetuating segregation for many years after *Brown I*. (193a-195a, 352a-356a, 360a-364a) Existing school division and political boundaries served as no impediment to the creation of regional schools for blacks con-

sisting of as many as five separate political subdivisions and comprising areas as large as 1,700 square miles, one of which was operated as late as 1968. (352a, 356a) With State encouragement, all the defendant school authorities participated in the assignment of pupils across political and school boundary lines throughout the period of tuition grants and pupil scholarships, and such lines were similarly disregarded when, to perpetuate segregation, blacks were transported to other divisions, and, indeed, across State boundaries as well to all-black schools. (330-331a, 360a-364a)

The District Court found that neither assignments across existing school division lines nor consolidation, though encouraged for many valid and invalid purposes in the past, had ever been utilized or considered as tools to facilitate the disestablishment of the statewide system of dual schools. (218a-219a, 278a, 281a-283a)

As early as 1944, the State Board of Education had looked with favor on a long-range plan having as its objective approximately a 50 per cent reduction in the total number of school divisions which would have necessarily involved the combination of then existing separate political subdivisions into single school divisions. (271a)

The District Court further predicated its conclusions as to the lack of any compelling interest in maintaining existing school division lines on the existence of a State statute which for many years had given unfettered discretion to the State Board of Education to divide the State into school divisions consisting of more than one political subdivision,[39] other sections of State law enacted in 1954 de-

[39] Va. Code Ann., § 22-30 (Repl. Vol. 1969). (607a) During the pendency of the proceedings below, however, a new statute became operative which divested the State Board of the power to act alone in so dividing the State's school divisions. Va. Code Ann., § 22-30, as amended (Cum. Supp. 1971). (617a)

tailing the method of operation of school divisions consisting of more than one political subdivision,[40] and another provision which expressly authorized the operation of joint schools by separate political subdivisions in accordance with rules and regulations to be promulgated by the State Board of Education."[41] (355a)

The lower Court's conclusion that existing lines were not inviolate was further supported by an abundance of expert testimony that as applied to the Richmond metropolitan area, the existing school division lines served no educational purpose, rendered effective desegregation impossible, and that the continued maintenance thereof would result in the denial of equal educational opportunity in the Richmond metropolitan area. (231a, 258a, 469a-478a)

3.

The Further Entrenchment Of The Dual School System And The Containment Of Blacks Since Brown I

It was not until 1970, sixteen years after *Brown I*, that the first significant effort was made to disestablish the state-mandated dual school system in Richmond, Virginia. This period saw the further entrenchment of the dual school systems in each of the three political subdivisions with the long range debilitating effects attendant thereto resulting in large measure from the overt defiance to the mandates of *Brown I and II*, the continuing discrimination at the federal, state and local levels in housing, and the concentration

[40] Va. Code Ann., §§ 22-100.1, -100.12 (Repl. Vol. 1969). (608a-613a) Slight amendments to these provisions pursuant to the July 1, 1971 constitutional revision failed to alter the substance of the 1954 statutes. See Va. Code Ann., §§ 22-100.1, -100.3 through -100.11 (Cum. Supp. 1971). (618a-621a)

[41] Va. Code Ann., § 22-7 (Repl. Vol. 1969). (607a)

ithin the City of all public and rent subsidized housing
cupied overwhelmingly by blacks.

As the District Court found, the effect of the refusal of
e Counties to authorize and permit such housing within
eir boundaries, and their blatant discrimination in public
nployment, had the foreseeable consequence of deterring
e movement of blacks to the Counties. (195a-211a)
hool site selection and construction through the 1970-71
hool year corresponded to and was superimposed upon
e segregated residential housing patterns within the three
calities as a result of the school authorities' continued
herence to neighborhood zoning irrespective of its effects
the process of desegregation. (203a-211a)

4.

ccentuation Of The Gross Racial Disparities Since 1954 Attributable In Part To State And Local Discrimination Through 1971

During the sixteen-year period from 1954 to 1970, char-
terized by the continuous utilization of practices designed
frustrate the process of school desegregation, the student
cial composition of the City system changed from 56
r cent white to 66 per cent black notwithstanding the 1970
nexation which produced an influx of more than 8,000
idents, 97 per cent of whom were white. Over the same
riod of time, the student racial compositions of the rapidly
owing contiguous suburban communities of Chesterfield
d Henrico had changed from 20 and 10 per cent black
spectively to 9 and 8 per cent black. The number of black
idents in the City had increased from 15,000 to 30,000
th the result that 85 per cent of the blacks in the Rich-
nd metropolitan area attended schools in the City. The
mbined racial composition within the three school divi-
ns, however, had varied less than one-tenth of one per
t in the preceding decade.

The District Court found that discriminatory practices and policies had facilitated the further entrenchment of the dual school systems, had contributed in part to the acceleration of the racial disparities between the City and County systems, and had rendered the process of disestablishment more difficult. (212a-222a)

5.

Failure Of The Three School Divisions Involved To Establish Unitary Systems By June, 1971

The open hostility of the County school authorities to any integration and the continued operation by all three school systems of black and white schools clearly identifiable as such by reference to student population and/or faculty membership through the school year 1970-71 has been summarized previously in the Statement, *supra*, at pp. 25-29. Thus, at the time of the hearings below all three systems were in the process of converting to unitary operations—required as a result of the persisting denial of equal educational opportunity and, like other recent cases presented to this Court,[42] a condition justifying the continued exercise of remedial power.

6.

White Attrition In City Schools And The Foreseeable Effects Thereof

The first significant attempt to desegregate Richmond schools occurred in the 1970-71 school year with the implementation of the "Interim Plan" which was accompanied by an exodus of more than 3,000 or 15 per cent of the total

[42] *E.g., Council of City of Emporia, supra; United States* v. *Scotland Neck City Bd. of Educ.*, ... U.S. ....., 92 S.Ct. 2214 (1971); *Swann, supra.*

white student population. This loss represented a 300 per cent increase in white attrition over previous years. Twelve months later the desegregation plan modeled upon the principles enunciated in *Swann* produced another exodus of more than 3,000 white students. Thus, Richmond sustained a loss of more than a third of its white students within a 12-month period involving two school openings.

The District Judge concluded that this massive withdrawal from the City system foreshadowed an all-black system within the foreseeable future and that the process of increasing polarization was immeasurably facilitated by the existence of the two virtually all-white school systems surrounding the City. (207a-210a) Judge Merhige thus concluded that effective relief could not be afforded within the limits of the City of Richmond and that the assignment of pupils across the existing school division lines was essential to the effective disestablishment of the state-mandated and perpetuated dual school system. (201a) These conclusions were amply supported by testimony predicting the utter frustration of the promises of *Brown I* and the certainty that black students for the foreseeable future could only look forward to attending substantially all-black center-City schools ringed by virtually all-white suburban schools. (469a-478a)

7.

The Presentation Of A Desegregation Plan Promising Realistically To Eliminate All Vestiges Of The Dual School System

Both the Richmond School Board's motion to compel joinder of parties needed for just adjudication and the plaintiffs' amended complaint envisioned a metropolitan desegregation plan wherein assignments of pupils would not be restricted by the existing school divisions lines. The plain-

tiffs sought relief by either the merger of the Richmond, Henrico and Chesterfield school divisions or through the development of a court-approved plan for the exchange of pupils between the three separate divisions.

The State and County defendants failed to offer any proposed modifications or alterations to the plan submitted by the City School Board nor did they submit any other plans despite adequate time and invitations to do so from the District Court and the Richmond Board as well. The District Court's order of January 10, 1972, which gave rise to this petition provided the State and County defendants with an abiding opportunity to seek modifications and alterations of the approved plan. (541a)

Significant features of the metropolitan desegregation plan have been detailed previously in the Statement, *supra*, at pp. *32-37*. The lower Court found the plan to be educationally sound and its implementation reasonable, feasible and workable. (428a, 432a) The District Judge, based on evidence presented, concluded that the metropolitan plan offered vastly superior prospects for effective relief in that it would insure (1) the elimination of the extreme racial disparities between the City and County systems; (2) the abolition of the County systems as white havens facilitating the further resegregation of Richmond schools; and (3) the eradication of all vestiges of the dual system of schools through the removal of the racial identifiability of all facilities in the Richmond metropolitan area. (239a-240a, 418a-435a)

The totality of the diverse circumstances noted above which in the judgment of the District Court required remedial action provides a stark contrast to the severely restrictive basis for relief as established by the Court of Appeals. School authorities and federal courts wrestling with the intricacies of relief from *de jure* segregation on

ıetropolitan area-wide basis urgently need guidance from s Court as to whether findings such as those noted above ›vide a sound basis for the approval by a district court of lan envisioning the assignment of students across exist- school district lines. Accordingly, the Richmond School ard respectfully suggests that the national importance the issues presented along with the inevitable conse- ences of the overly narrow limitation placed upon the ıedial powers of the District Court by the Court of peals compel a full review by this Court.

C.

ıether, In The Formulation Of Effective Relief, District Courts Are Permitted To Utilize Means Coextensive With Those Used To Establish And Perpetuate A Statewide System Of Dual Schools

A major portion of the proceedings below consisted of extensive development by largely uncontradicted evi- ıce of the role of the State and local school authorities he establishment and perpetuation for more than a decade ond *Brown I* of a dual system of schools, and of their uctant and incomplete efforts in eradicating the vestiges reof up to the time of the hearings below. All of the de- es and means, both ingenious and ingenuous, utilized in n, yet harmful attempts to defy, circumvent and delay realization of the promises of *Brown I and II* were ailed in full. Accordingly, this evidence and its own ısiderable experience in school desegregation cases in rginia compelled the District Court to reject the pleas the State and County defendants as to the allegedly his- ical tradition of local autonomy, their opposition to as-

signments across existing school boundaries, and to the consolidation of the three school divisions.[43]

During this all too recent period, the State, not only without objection but with the encouragement of the Counties, assumed all control over the assignment of pupils and, in some instances, the complete operation of local public schools—which attributes are now alleged to be the hallmarks of the so-called historical tradition of local autonomy in the operation of Virginia's public schools. (575a-576a) For decades the State encouraged consolidation of separate school divisions and the operation of the joint schools for all educational objectives, save desegregation. Years ago the General Assembly of Virginia established a detailed framework for the operation of school divisions consisting of more than one political subdivision, though obviously with no view of utilizing this procedure as a tool in the dismantling of dual school systems.

The State with the concurrence of local school authorities employed principles of consolidation in establishing regional schools for blacks which operated as late as 1968, and many local school boards including the defendants herein for many years engaged in the joint operation of special educational facilities which of necessity required the daily crossing of the existing school division lines; however, neither the State nor the local school authorities herein have ever recommended that these techniques be employed for the purpose of dismantling the system of dual schools. Rather, the assignment of students across existing school division, political subdivision, and, indeed, State lines was encouraged, financed and required of thousands of pupils

[43] The District Court made specific findings regarding the racial hostility which underlay the opposition to the use of such obvious techniques on the part of the State and County officials. (212a, 230a-231a)

by the State and local authorities for the sole purpose of perpetuating segregation.

The desegregation plan presented by the Richmond School Board and approved by the District Court involved the assignment of pupils across existing school division lines and the utilization of the legislatively conceived plan for the operation of a consolidated school division—the same tools and principles utilized by the same school authorities in establishing a system of segregated schools and in maintaining and perpetuating it for years after *Brown I.*

It is apparent that the District Court deemed such long-standing utilization of these devices and principles for both valid and invalid purposes as affording a rational basis for requiring the defendant State and local authorities to exercise the powers which they now have under State law in providing for the complete and effective desegregation of all schools in the Richmond metropolitan community.

In view of its silence in this area, it can only be inferred that in the opinion of the Court of Appeals such past conduct was irrelevant in determining the scope of the remedial powers of the lower Court.

This Court as early as 1955 in *Brown II, supra,* 349 U.S. at 299-301, recognized the extreme complexity of the problems involved in the dismantling of state-mandated dual school systems, and that imaginative and, indeed at times, drastic measures might well be required.

The record establishes, however, that the State of Virginia has taken no affirmative voluntary actions, much less drastic ones, to dismantle its dual system of schools. (212a-222a, 332a-352a) In light of this State's abdication of its affirmative duty to take whatever steps might be necessary to eradicate all vestiges of its dual system of schools, it is certainly reasonable to require the District Court in molding its desegregation decree to meet the ex-

igencies of the case to utilize means and methods at least co-extensive with those which have been employed by the State and local officials in the active and continuous perpetuation of illegal discrimination in public education.

The limitations on the remedial power of the District Court as imposed by the Court of Appeals in this case, however, produced the incongruous result that the powers of the lower Court to insure the removal of all vestiges of a state-mandated dual school system are not to be as extensive as the means utilized by the State to deny equal educational opportunity, and that the existence of school division lines which have never served as barriers or impediments to the retention and promotion of segregation in the past, now precludes effective relief in the Richmond community.[44]

The Richmond School Board submits that this Court should resolve whether proof of state support and encouragement of student assignments across political subdivision lines for valid educational purposes as well as for the perpetuation of illegal segregation may be a sound basis for the judicial approval of such techniques as a means of eliminating all vestiges of a system of state-mandated segregation.

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[44] The United States Court of Appeals for the Fifth Circuit has recognized that "[b]arriers which did not prevent enforced segregation in the past" will not be allowed to impede the process of desegregation. *Henry* v. *Clarksdale Mun. Separate School Dist.*, 433 F.2d 387, 394 (5th Cir. 1970).

CONCLUSION

For the foregoing reasons, the School Board of the City f Richmond and the individual members thereof respect-ılly submit that the Petition for Certiorari should be ranted to review the judgment of the United States Court f Appeals for the Fourth Circuit.

Respectfully submitted,

GEORGE B. LITTLE
JAMES K. CLUVERIUS
Browder, Russell, Little & Morris
1510 Ross Building
Richmond, Virginia 23219

CONARD B. MATTOX, JR.
City Attorney
1001 East Broad Street
Richmond, Virginia 23219

Attorneys for Petitioners